

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SPECIAL SITUATIONS FUND III QP,) Case No. 14-cv-04717-SC
L.P., et al.,)
Plaintiffs,) ORDER GRANTING IN PART AND
v.) DENYING IN PART DEFENDANTS'
Defendants.) MOTION TO DISMISS

I. INTRODUCTION

Now before the Court is Defendants H. Ravi Brar, Susie Herrmann, and Murray Jones' (collectively "Defendants") motion to dismiss. ECF No. 18. The motion is fully briefed.¹ Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for disposition without oral argument. For the reasons set forth below, Defendants' motion is GRANTED in part and DENIED in part. Some of Plaintiffs' claims survive Defendants' motion and some are

¹ ECF Nos. 20 ("Opp'n"), 24 ("Reply").

1 DISMISSED WITH LEAVE TO AMEND, as specified below.

2

3 **II. BACKGROUND**

4 At the motion to dismiss stage, the Court assumes the truth of
5 Plaintiffs' well-pleaded factual allegations, so these facts come
6 from Plaintiffs' complaint. ECF No. 1 ("Compl."). Defendants were
7 all officers of ECotality, Inc. ("ECotality"), a company that
8 designed, manufactured, and sold electric vehicle ("EV") charging
9 systems. Compl. ¶¶ 3, 18-20. Mr. Brar was the Chief Executive
10 Officer ("CEO"), Ms. Herrmann was the Chief Financial Officer
11 ("CFO"), and Mr. Jones was the Chief Operating Officer ("COO").
12 Id. ¶¶ 18-20. Plaintiffs are institutional investors that
13 purchased \$6.4 million worth of ECotality common stock through a
14 Securities Purchase Agreement ("SPA") on June 12, 2013. Id. ¶¶ 1,
15 7. Plaintiffs made what is called a private investment in public
16 equity deal ("PIPE deal"). Id. ¶ 1.

17 When Plaintiffs purchased their stock, ECotality was almost
18 entirely dependent on the United States Department of Energy's
19 ("DOE") Vehicle Technologies Program for its revenue. Id. ¶¶ 4-5.
20 DOE had awarded ECotality a \$100 million grant to run a large
21 deployment of EV charging infrastructure throughout the country
22 (the "EV Project"). Id. ¶ 4. The SPA, which Mr. Brar signed,
23 included several provisions intended to protect the PIPE investors:
24 (1) ECotality had not received any cure notice; (2) there were no
25 outstanding material claims or disputes between ECotality and any
26 governmental authority; (3) ECotality had not been under
27 investigation or audit by any governmental authority; (4) ECotality
28 had not been requested to provide information under threat of legal

1 or administrative penalty; and (5) ECotality had not made any
2 disclosure to a governmental authority concerning any alleged non-
3 compliance. Id. ¶ 6.

4 Plaintiffs allege that those representations were fraudulent.
5 Id. ¶ 7. On June 9, 2013, three days before the SPA was executed,
6 ECotality informed DOE that ECotality might be unable to meet the
7 EV Project's September 30, 2013 target for completion of charging
8 installations. Id. ¶ 8. On June 14, two days after the SPA was
9 executed but four days before it closed, DOE sent ECotality a cure
10 notice explaining that DOE had found that ECotality might be unable
11 to complete the installation and data collection requirements of
12 the EV Project and requiring ECotality to submit a corrective
13 action plan ("CAP"). Id. The PIPE deal closed on June 18. During
14 closing, ECotality reiterated its promises to the PIPE investors,
15 including that it had not received any cure notice. Id.

16 On August 12, 2013, ECotality revealed numerous problems with
17 its business, including its inability to complete the EV project
18 and DOE's suspension of all payments to the company. Id. ¶ 10.
19 ECotality also indicated that it might file for bankruptcy. Id.
20 After the news broke, ECotality's stock plummeted 79%, to \$0.31 per
21 share (it was \$2.04 per share when the PIPE investors bought stock
22 through the SPA). Id. ¶ 11. ECotality filed for bankruptcy on
23 September 16. Id.

24 A related case, In re ECotality Securities Litigation ("In re
25 ECotality, No. 13-03791"), is also currently before the Court. That
26 case represents consolidated class actions against ECotality, Mr.
27 Brar, Ms. Hermann, and others. Plaintiffs in this case are members
28 of the class alleged in In re ECotality, but they have opted out of

1 that litigation to bring their own case instead. In September of
2 last year, the Court granted the In re ECotality defendants' motion
3 to dismiss, dismissing some claims with prejudice and others with
4 leave to amend. See In re ECotality, Inc. Sec. Litig., No. 13-
5 03791-SC, 2014 WL 4634280 (N.D. Cal. Sept. 16, 2014).

6 In this action, Plaintiffs bring claims under Section 10(b) of
7 the Securities Exchange Act of 1934 (the "Exchange Act") against
8 Mr. Brar. They also bring claims against all Defendants as control
9 persons under Section 20(a) of the Exchange Act. Additionally,
10 Plaintiffs bring claims for violations of Sections 25401 and 25501
11 of the California Corporations Code against Mr. Brar, and for
12 violations of Section 25504 against all Defendants as control
13 persons.

14

15 **III. LEGAL STANDARD**

16 **A. Motion to Dismiss**

17 A motion to dismiss under Federal Rule of Civil Procedure
18 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
19 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
20 on the lack of a cognizable legal theory or the absence of
21 sufficient facts alleged under a cognizable legal theory."
22 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
23 1988). "When there are well-pleaded factual allegations, a court
24 should assume their veracity and then determine whether they
25 plausibly give rise to an entitlement to relief." Ashcroft v.
26 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
27 must accept as true all of the allegations contained in a complaint
28 is inapplicable to legal conclusions. Threadbare recitals of the

1 elements of a cause of action, supported by mere conclusory
2 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
3 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
4 complaint must be both "sufficiently detailed to give fair notice
5 to the opposing party of the nature of the claim so that the party
6 may effectively defend against it" and "sufficiently plausible"
7 such that "it is not unfair to require the opposing party to be
8 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
9 1202, 1216 (9th Cir. 2011).

10 **B. Section 10(b) and Rule 10(b)(5)**

11 Section 10(b) of the Exchange Act makes it unlawful "[t]o use
12 or employ, in connection with the purchase or sale of any security
13 registered on a national securities exchange . . . any manipulative
14 or deceptive device or contrivance in contravention of such rules
15 and regulations as the [Securities and Exchange] Commission may
16 prescribe" 15 U.S.C. § 78j(b). One such rule prescribed
17 by the SEC is Rule 10b-5. Rule 10b-5 makes it unlawful to (a)
18 employ any device, scheme, or artifice to defraud; (b) make an
19 untrue statement of material fact or omit a material fact necessary
20 to make a statement not misleading; or (c) engage in an act,
21 practice, or course of business which operates as a fraud or deceit
22 in connection with the purchase or sale of any security. 17 C.F.R.
23 § 240.10b-5. To establish a violation of Section 10(b) or Rule
24 10b-5, Plaintiffs must plead five elements: "(1) a material
25 misrepresentation or omission of fact, (2) scienter, (3) a
26 connection with the purchase or sale of a security, (4) transaction
27 and loss causation, and (5) economic loss." In re Daou Sys., 411
28 F.3d 1006, 1014 (9th Cir. 2005).

1 Plaintiffs must also meet the heightened pleading standards of
2 Federal Rule of Civil Procedure 9(b) and the Private Securities
3 Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4. The
4 PSLRA requires plaintiffs to "specify each statement alleged to
5 have been misleading [and] the reason or reasons why the statement
6 is misleading." 15 U.S.C. § 78u-4(b)(1). Additionally, the
7 complaint must "state with particularity facts giving rise to a
8 strong inference that the defendant acted with the required state
9 of mind." Id. § 78u-4(b)(2). The "required state of mind" for
10 establishing securities fraud is the knowing, intentional, or
11 deliberately reckless disclosure of false or misleading statements.
12 See Daou, 411 F.3d at 1014-15. "The stricter standard for pleading
13 scienter naturally results in a stricter standard for pleading
14 falsity, because falsity and scienter in private securities fraud
15 cases are generally strongly inferred from the same set of facts,
16 and the two requirements may be combined into a unitary inquiry
17 under the PSLRA." Id. at 1015 (internal quotation marks omitted).
18

19 **IV. DISCUSSION**

20 **A. Section 10(b) Claims**

21 Defendants make a number of arguments that Plaintiffs' claims
22 under Section 10(b) of the Exchange Act should be dismissed. The
23 Court addresses these arguments first.

24 **1. Mr. Brar as the "Maker" of Statements in the SPA**

25 Defendants first argue that Mr. Brar cannot be held
26 responsible for the contents of the SPA. Though Mr. Brar signed
27 the SPA on behalf of ECotality, Defendants argue that only
28 ECotality, and not Mr. Brar (or anyone else) was responsible for

1 those statements. See ECF No. 18-2 ("RJN I") Ex. 2 ("SPA") at 40.
2 Defendants point to language in the SPA that implies that ECotality
3 made the representations in that document. See id. at 24. In
4 support of this argument, Defendants cite to a recent Supreme Court
5 case holding that an investment adviser did not "make" statements
6 issued by its client, a business trust responsible for a family of
7 mutual funds. See Janus Capital Grp., Inc. v. First Derivative
8 Traders, 131 S. Ct. 2296, 2300-03 (2011). Defendants argue that
9 only ECotality "made" the statements in the SPA, and that the
10 company's officers and directors are therefore insulated from them.

11 Unfortunately for Defendants, courts have routinely rejected
12 their argument. "Courts have consistently held that the signer of
13 a corporate filing is its 'maker,' because signing a filing implies
14 'ultimate control' over its contents." SEC v. e-Smart Techs.,
15 Inc., 31 F. Supp. 3d 69, 80 (D.D.C. 2014); see also SEC v. Brown,
16 878 F. Supp. 2d 109, 116 (D.D.C. 2012) ("Both before and after the
17 decision in Janus, courts have consistently held that the signer of
18 a corporate filing is its 'maker.'"). Speaking more generally,
19 "Janus did not [] alter the well-established rule that a
20 corporation can act only through its employees and agents." Brown,
21 878 F. Supp. 2d at 116 (quoting In re Pfizer Inc. Sec. Litig., No.
22 04 Civ. 9866, 2012 WL 983548, at *4 (S.D.N.Y Mar. 22, 2012)).

23 Indeed, Janus is wholly inapposite. The only principles from
24 Janus important to this case are that only the maker of a statement
25 can be liable for it, and that "the maker of a statement is the
26 person or entity with ultimate authority over the statement,
27 including its content and whether and how to communicate it."
28 Janus, 131 S. Ct. at 2302. But the Court has found that Mr. Brar

1 was the "maker" of the SPA, because he signed it. The Supreme
2 Court's analysis finding that the Janus defendants did not make the
3 statements at issue in that case is not relevant, because the
4 Supreme Court's analysis rested on the fact that the business
5 trust, and not the defendant investment adviser, (which were two
6 distinct business entities) had a statutory obligation to file, and
7 did file, the allegedly misleading documents with the SEC. Janus,
8 131 S. Ct. at 2304. No analogous situation is involved here.

9 Defendants retort that the SPA was a contract, not an SEC
10 filing, so the rule that the signer of a statement is the maker of
11 that statement should not apply. It is unclear to the Court why
12 Defendants believe that a corporate officer's signature establishes
13 him as the "maker" of statements in an SEC filing but not in a
14 contract. Defendants rely on a well-established, but entirely
15 irrelevant, rule to justify that distinction: corporate officers
16 are generally not personally liable on contracts they sign on
17 behalf of the corporation. That would matter if Plaintiffs were
18 suing to enforce the terms of the SPA against Mr. Brar. If
19 Plaintiffs sought to enforce the contract, they would likely only
20 have a case against ECOTality, and not Mr. Brar. But Plaintiffs
21 are not suing Mr. Brar to enforce the terms of the contract. They
22 are suing him for fraud. The fact that the allegedly fraudulent
23 statements were made in a contract that bound only ECOTality does
24 not absolve Mr. Brar from liability.²

25 ² To put it another way, Plaintiffs accuse Mr. Brar of fraudulently
26 inducing them to enter into a contract. That the contract bound
27 ECOTality, and not Mr. Brar individually, does not immunize Mr.
28 Brar from liability for fraud. Corporate officers who execute
contracts may not be personally liable for performing those
contracts, but officers are liable for torts they direct or in

1 2. **Falsity and Scienter**

2 Defendants next argue that the complaint fails to plead facts
3 giving rise to a strong inference that any defendant acted with
4 scienter. The PSLRA requires a complaint to "state with
5 particularity facts giving rise to a strong inference that the
6 defendant acted with the required state of mind." 15 U.S.C. § 78u-
7 4. The Supreme Court has further explained how strong that
8 inference must be:

9 The inference that the defendant acted with scienter need
10 not be irrefutable . . . or even the most plausible of
11 competing inferences. . . . Yet the inference of
12 scienter must be more than merely 'reasonable' or
13 'permissible' -- it must be cogent and compelling, thus
14 strong in light of other explanations. A complaint will
survive, we hold, only if a reasonable person would deem
the inference of scienter cogent and at least as
compelling as any opposing inference one could draw from
the facts alleged.

15 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 310
16 (2007) (internal quotation marks and citations omitted). The Ninth
17 Circuit has also elucidated the pleading standard: "the complaint
18 must contain allegations of specific contemporaneous statements or
19 conditions that demonstrate the intentional or the deliberately
20 reckless false or misleading nature of the statements when made."
21 Ronconi v. Larkin, 253 F.3d 423, 432 (9th Cir. 2001) (internal
22 quotations omitted). In other words, the defendant's knowledge or
23 deliberately reckless disclosure of false or misleading information

24
25 which they participate. See, e.g., Transgo, Inc. v. Ajac
26 Transmission Parts Corp., 768 F.2d 1001, 1021 (9th Cir. 1985) ("A
27 corporate officer or director is, in general, personally liable for
all torts which he authorizes or directs or in which he
participates, notwithstanding that he acted as an agent of the
corporation and not on his own behalf.") (internal quotation marks
28 omitted).

1 must be at least as compelling as any other inference that can be
2 drawn from the facts in the complaint. The Supreme Court has
3 further emphasized that the Court must "assess all the allegations
4 holistically," and that "[t]he inquiry . . . is whether all of the
5 facts alleged, taken collectively, give rise to a strong inference
6 of scienter, not whether any individual allegation, scrutinized in
7 isolation, meets that standard." Tellabs, 551 U.S. 308, 322-23,
8 326. Defendants argue that the complaint fails to allege facts
9 indicating that Mr. Brar knew the statements in the SPA to be false
10 when made.

i. Knowledge of the DOE Letter

12 Many of Plaintiffs' allegations of falsity and scienter depend
13 on Mr. Brar's knowledge of the contents of the letter DOE sent to
14 ECotality on June 14, 2014. Defendants argue that the complaint
15 fails to plead that the letter arrived before June 18 or that any
16 defendant saw the letter at any time. The proper question, though,
17 is whether the facts in the complaint, taken together, raise a
18 strong inference that Defendants knew about the information in the
19 letter by June 18. Plaintiffs point out that the Ninth Circuit has
20 in the past adopted a presumption that a letter was received three
21 days after it was mailed. Payan v. Aramark Mgmt. Servs. Ltd.
22 P'ship, 495 F.3d 1119, 1126 (9th Cir. 2007). Following that rule,
23 it would be fair to presume that ECotality received the cure notice
24 by June 17.

25 More difficult is the issue of whether any individual
26 defendant had knowledge of the letter. Generally speaking,
27 allegations that "facts critical to a business's core operations or
28 an important transaction generally are so apparent that their

1 knowledge may be attributed to the company and its key officers" 2 are insufficient to raise a strong inference of scienter. Zucco 3 Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1000 (9th Cir. 4 2009), as amended (Feb. 10, 2009). There are two exceptions to 5 that general rule.

6 First, "general allegations about management's role in a 7 corporate structure and the importance of the corporate information 8 about which management made false or misleading statements [may] 9 create a strong inference of scienter when these allegations are 10 buttressed with detailed and specific allegations about 11 management's exposure to factual information within the company." 12 Id.

13 Plaintiffs fail to plead any specific facts about Mr. Brar's 14 exposure to factual information within the company. Plaintiffs 15 apparently have evidence of his exposure to information: Mr. Brar 16 was in direct contact with DOE, making it likely that such 17 important correspondence from DOE would have been brought to his 18 attention. See ECF No. 21 ("Hecht Decl.") Exs. A, C. That 19 correspondence is not incorporated by reference into the complaint, 20 however, and Plaintiffs fail to plead any facts regarding Mr. 21 Brar's correspondence with DOE. Even if Plaintiffs had pleaded 22 those facts, they might still have been insufficient to establish 23 this exception. The Ninth Circuit's examples of allegations that 24 would satisfy this exception are even more specific: (1) "specific 25 admissions from top executives that they are involved in every 26 detail of the company and that they monitored portions of the 27 company's database;" (2) "a specific admission from a top executive 28 that '[w]e know exactly how much we have sold in the last hour

1 around the world;'" or (3) "other particular details about the
2 defendants' access to information within the company." Zucco
3 Partners, 552 F.3d at 1000.

4 The second exception applies to cases "where the facts [are]
5 prominent enough that it would be absurd to suggest that top
6 management was unaware of them." Zucco Partners, 552 F.3d at 1001.
7 At the time that ECotality received the letter from DOE, ECotality
8 derived nearly all of its revenues from DOE, and specifically from
9 the grant for the EV Project. The letter therefore constituted a
10 warning that almost all of ECotality's revenues (the source of its
11 \$100 million grant) were at risk. It would indeed be absurd to
12 suggest that ECotality's management was unaware that its critical
13 revenue stream was at risk. A letter from DOE explaining that
14 ECotality's participation in the EV Project might be terminated
15 absent immediate action (the letter set a three week deadline for
16 proposing a corrective action plan) was the sort of information
17 certain to go straight to top management.

18 The only reason the Court hesitates in applying this exception
19 is the timing. Plaintiffs are required to raise a strong inference
20 that Mr. Brar's statements were false when made, and the close
21 proximity in time of ECotality's receipt of the letter and the
22 closing of the SPA are potentially problematic. If Mr. Brar lacked
23 knowledge of the letter until its presumptive receipt on June 17,
24 then he might still have lacked knowledge of the letter when the
25 SPA closed -- so long as it took more than a day or so for the
26 letter's contents to reach him. Given the importance of the
27 letter, though, the Court finds even such a short delay unlikely.
28 In this case, the inference that the DOE letter was immediately

1 brought to Mr. Brar's attention is at least as strong as any
2 inference that ECOTality (intentionally or unintentionally) delayed
3 in informing him about the letter. The length of time it took to
4 the letter to reach Mr. Brar is precisely the sort of issue on
5 which discovery is warranted. The Court finds that Plaintiffs have
6 pleaded facts sufficient to establish that the absurdity exception
7 applies. The facts in the complaint raise a strong inference that
8 Mr. Brar was aware of the DOE letter by June 18.

ii. Cure Notice

10 The complaint alleges that Defendants represented in the SPA
11 that ECotality had not received any cure notice. Compl. ¶ 6. It
12 further alleges that Defendants advised DOE at a meeting on June
13 10, 2013³ that ECotality might be unable to meet a deadline for the
14 EV Project, and that DOE sent a cure notice to ECotality dated June
15 14. Id. ¶ 8. The PIPE deal closed four days later on June 18.
16 Id.

17 Defendants argue that the representation was not false because
18 the letter ECotality received from DOE was not a cure notice.
19 Defendants do not explain exactly why they believe the letter was
20 not a cure notice, but they do claim that the letter from DOE
21 merely "'requests' a corrective action plan." Opp'n at 16 (bold
22 and italic emphasis in original). Defendants are correct that the
23 letter contains that language. However, in the sentence after
24 "requesting" a corrective action plan ("CAP"), DOE goes on to say
25 that the CAP "must provide the following in order to address DOE's

26 ³ The complaint and the DOE letter refer to a June 9, 2013 meeting,
27 but DOE's memorandum on the meeting says the meeting was actually
28 on June 10. See ECF No. 21 ("Hecht Decl.") Ex. B; Opp'n at 17.
The Court will refer to the meeting by the June 10 date.

1 concerns" and lists six very specific requirements. RJD I Ex. 15
2 ("DOE Letter"). The letter also says that "[t]he corrective action
3 plan must be submitted to my attention no later than twenty-one
4 (21) days from receipt of this letter." Id. Finally, the letter
5 threatens that "[f]ailure to provide and take corrective action
6 could lead to imposition of remedies, including suspension or
7 termination, for non-compliance as outlined 10 CFR 600.352." Id.

8 The letter explicitly demands a CAP containing certain content
9 by a certain date, and threatens sanctions (and potentially
10 termination of ECotality's grant) if the plan is not satisfactory.
11 Given those facts, Defendants' contentions that the letter only
12 "requests" corrective action is laughable. The letter lays out
13 DOE's concern that ECotality may be unable to complete the EV
14 Project on time. It demands that ECotality develop a plan to
15 complete the project on time, and threatens potentially severe
16 sanctions if ECotality fails either to produce such a plan or to
17 put it into effect. The content of the letter is sufficient to
18 convince the Court that the letter from DOE was a cure notice.

19 Plaintiffs have pleaded facts sufficient to raise a strong
20 inference that Mr. Brar knew about the cure notice by June 18.
21 Plaintiffs have also pleaded facts sufficient to demonstrate that
22 the letter was a cure notice. Combined with the SPA's
23 representation that ECotality had never received a cure notice,
24 these allegations state a claim for securities fraud. Defendants'
25 motion to dismiss is DENIED as to Plaintiffs' Exchange Act claims
26 to the extent those claims are premised on Mr. Brar's
27 representation that ECotality had never received a cure notice.

28 ///

iii. Material Disputes Between ECotality and Government

3 The next relevant representation in the SPA was that there
4 were no outstanding material claims or disputes between ECotality
5 and any governmental authority. According to Plaintiffs, a
6 "material dispute" existed between DOE and ECotality regarding
7 ECotality's progress towards completion of the EV Project.
8 Plaintiffs allege that during the June 10, 2013 meeting with DOE,
9 ECotality indicated to DOE that it might be unable to meet the
10 September 30, 2013 milestone for completion of charging station
11 installations. DOE had deemed the September 30 milestone
12 "significant." Compl. ¶ 32. Additionally, the June 14 cure notice
13 required ECotality to develop a corrective action plan ("CAP") to
14 resolve its noncompliance with the EV Project deadlines. Id. ¶ 33.
15 For the reasons discussed previously, the Court finds that
16 Plaintiffs have raised a strong inference that Defendants knew
17 about these facts.

18 Defendants' primary argument here is that the exchange between
19 DOE and ECOTality did not constitute a "material dispute."
20 Instead, Defendants urge that ECOTality's relationship with DOE
21 should be characterized as a "collaborative effort" and a
22 "partnership" to "jointly navigat[e] challenges." Opp'n at 13-14.
23 Defendants are simply arguing against the facts alleged in the
24 complaint and presented in the incorporated documents. The letter
25 from DOE is certainly sufficient, at the motion to dismiss stage,
26 to establish the likelihood that a material dispute existed.⁴

²⁷ ²⁸ ⁴ The Court notes that the existence of a collaborative partnership does not necessarily preclude the existence of a material dispute

1 Defendants are free to argue that the true facts were otherwise at
2 later stages of the litigation, but Plaintiffs' complaint states a
3 claim. Defendants' motion is DENIED with respect to Plaintiffs'
4 Exchange Act claims to the extent those claims are based on Mr.
5 Brar's representation that no outstanding material dispute existed
6 between ECotality and any government agency.

iv. Investigation or Audit by Governmental Authority

9 Next, Plaintiffs allege that Defendants misrepresented that
10 ECotality had not been under investigation or audit by any
11 governmental authority. Defendants argue that the complaint does
12 not specify "who or what DOE was investigating, much less any facts
13 that suggest Defendants knew about any purported investigation when
14 the SPA closed." Opp'n at 14.

15 On this point, Defendants are correct. Plaintiffs' complaint
16 focuses on an audit conducted by the DOE Office of the Inspector
17 General ("OIG"). Compl. ¶¶ 42-44. But the OIG report makes clear
18 that it was auditing DOE, not ECotality. Specifically, OIG was
19 investigating and assessing DOE's decisions regarding disbursement
20 of funds to ECotality. See RJN I Ex. 4 at 2-3. A DOE office's
21 audit of the Department's own program cannot constitute an audit or
22 investigation of ECotality. As a result, the complaint fails to
23 state facts alleging that ECotality was under investigation or
24 audit by a government agency when the SPA closed. Defendants'
25 motion is GRANTED with respect to the Exchange Act claim predicated
26 on the representation that ECotality was not under audit or

28 || between the partners.

1 investigation. That claim is DISMISSED WITH LEAVE TO AMEND;
2 Plaintiffs may amend their complaint to add facts demonstrating
3 that ECotality was under audit or investigation when the SPA
4 closed.

5 **v. Request for Information**

6 Next, the SPA represents that ECotality had not been requested
7 to provide information under threat of legal or administrative
8 penalty. Defendants discuss this claim only briefly, stating that
9 "there is neither a particularized allegation that such a request
10 was made nor that any Defendant was aware of it." Mot. at 15. The
11 complaint alleges that the DOE letter "demanded that ECotality
12 submit a corrective action plan" and "warned that failure to
13 provide the requested information . . . could lead to imposition of
14 sanctions" Compl. ¶ 8. The letter, which the complaint
15 incorporates by reference, actually requests quite a lot of
16 information, including, for example, "[a] list of all chargers
17 procured under the project to date, the cost of each charger, the
18 current location of each charger" and "[a] change document which
19 identifies the changes to the project when compared to the most
20 current approved project plan." DOE Letter at 1. The letter
21 threatens administrative sanctions if that information is not
22 provided. Id. at 2.

23 Indeed, it is difficult to understand how the letter could be
24 read as not requesting information under threat of legal or
25 administrative penalty, and Defendants do not seriously argue that
26 it is not (they argue only that the complaint fails to plead that
27 it is). The Court finds that the complaint and incorporated
28 documents are sufficient to plead that ECotality received a request

1 for information under threat of legal or administrative penalty.
2 That request was the June 14, 2013 letter from DOE. For the
3 reasons discussed above, the Court finds that the complaint raises
4 a strong inference that Mr. Brar had knowledge of that letter by
5 June 18. Thus Plaintiffs state an Exchange Act claim to the extent
6 their claim is based on the representation in the SPA that
7 ECOTality had never received a request for information under threat
8 of sanction. Defendants' motion is DENIED with respect to that
9 claim against Mr. Brar.

vi. Disclosure Concerning Alleged Non-Compliance

12 Next, the SPA represents that ECOTality had not made any
13 disclosure to a governmental authority concerning any alleged non-
14 compliance. The complaint alleges "that ECOTality had already [by
15 June 18, 2013] made disclosures to the DOE with respect to its
16 alleged non-compliance as recently as June 10, 2013"
17 Compl. ¶ 8. Though the complaint speaks of multiple "disclosures,"
18 the only specific disclosure alleged is the June 10 meeting, during
19 which ECOTality informed DOE that the company might miss the
20 September 30 milestone. Defendants are correct that that meeting
21 does not seem to qualify as a disclosure concerning alleged non-
22 compliance.

23 The relevant language from the SPA is, in its entirety:

24 [t]he Company and its Subsidiaries . . . have not during
25 the past three years . . . with respect to any Government
26 Contract, Government Bid or Government Assistance
27 Agreement, conducted or initiated any investigation or
made any disclosure to a Governmental Authority with
respect to any alleged irregularity, misstatement, non-
compliance or false claim

28 SPA at 21. From the facts alleged in the complaint, it is not

1 clear that any non-compliance had been alleged by June 10. The
2 complaint does not plead facts demonstrating that the possibility
3 of missing a future project milestone was considered "non-
4 compliance" under the SPA. Second, even if Plaintiffs had pleaded
5 such facts, it is not clear that any non-compliance had been
6 alleged by June 10. The complaint suggests that DOE's first
7 allegation of non-compliance (if it can even be called that) came
8 in the June 14 letter. See Compl. ¶ 8.

9 Defendants' motion is GRANTED with respect to Plaintiffs'
10 Exchange Act claims, to the extent those claims are based on the
11 representation in the SPA that ECotality had not made any
12 disclosure with respect to alleged non-compliance. Those claims
13 are DISMISSED WITH LEAVE TO AMEND. Plaintiffs may amend their
14 complaint to include facts alleging that (1) non-compliance was
15 alleged and (2) ECotality made a disclosure to a governmental
16 authority with respect to that alleged non-compliance before the
17 closing of the SPA.

18 **vii. Solvency**

19 Finally, the SPA includes a statement that, "upon
20 consummation of the [PIPE deal] . . . [ECotality's] assets do not
21 constitute unreasonably small capital to carry on its business as
22 now conducted and as proposed to be conducted . . ." Compl. ¶
23 45. Plaintiffs allege that that statement was false because
24 ECotality acknowledged in a Form 8-K submitted to the SEC on August
25 12, 2013 (signed by Mr. Brar and Ms. Herrmann) that "[a]s we
26 focused on our business plan for strong growth of our commercial
27 businesses we were cognizant that fully executing on our plan would
28 require us to raise additional capital to supplement our cash flows

1 from operations." RJD I Ex. 11 at 2; see also Compl. ¶ 51.

2 Plaintiffs acknowledge that the SPA also included a statement
3 advising the PIPE investors that ECotality "intends to raise
4 additional capital . . . in order to fund operations and for the
5 expansion of its network as required to fully execute its business
6 plan." Compl. ¶ 47. However, Plaintiffs allege that they were
7 deceived into believing that ECotality had sufficient assets to
8 complete the EV Project. Id. ¶¶ 48-49.

9 There are a number of problems with that allegation. The
10 first is that falsity is not adequately pleaded because Plaintiffs
11 have failed to plead facts demonstrating that the statement was
12 false when made. ECotality declared bankruptcy about two months
13 after the SPA was signed, but Plaintiffs have not pleaded facts
14 showing that ECotality lacked sufficient capital when the PIPE deal
15 closed. Second, Plaintiffs fail to plead facts sufficient to raise
16 a strong inference of scienter. The supposedly incriminating
17 statement from the Form 8-K repeats almost verbatim the
18 qualification in the SPA. Both state that ECotality intended raise
19 additional capital to carry out its business plan. Moreover, the
20 Form 8-K says ECotality was "cognizant" of the need to raise
21 capital to execute its "plan for strong growth of our commercial
22 operations," not to complete its participation in the EV Project.
23 That statement, therefore, provides no indication that ECotality
24 was aware that it lacked the capital required to complete the EV
25 Project (rather than expand its commercial operations). Third,
26 even if the Form 8-K had specified that ECotality was aware that it
27 needed more capital, it did not say when any defendant became
28 cognizant of that need.

1 Defendants' motion to dismiss is GRANTED with respect to the
2 allegation that the Form 8-K misled the PIPE investors into
3 believing that ECotality did not need additional capital to
4 complete the EV Project. This claim is DISMISSED WITH LEAVE TO
5 AMEND. Plaintiffs may amend their complaint to plead facts
6 demonstrating that (1) Defendants actually represented that they
7 did not need more capital to complete the EV Project; (2) that
8 representation was false; and (3) Defendants knew the
9 representation was false when made.

10 **3. Loss Causation**

11 Defendants next argue that Plaintiffs fail to plead loss
12 causation. The loss causation element of a securities fraud case
13 requires the plaintiff to prove "a causal connection between the
14 material misrepresentation and the loss." Dura Pharm., Inc. v.
15 Broudo, 544 U.S. 336, 342 (2005). "Typically, to satisfy the loss
16 causation requirement, the plaintiff must show that the revelation
17 of that misrepresentation or omission was a substantial factor in
18 causing a decline in the security's price, thus creating an actual
19 economic loss for the plaintiff." Nuveen Mun. High Income
20 Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1119 (9th Cir.
21 2013) (internal quotation marks omitted). Alternatively,
22 "plaintiffs will survive a motion to dismiss if they allege that
23 the defendant's misstatements and omissions concealed the price-
24 volatility risk (or some other risk) that materialized and played
25 some part in diminishing the market value of the security." Cement
26 & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard
27 Co., 964 F. Supp. 2d 1128, 1145 (N.D. Cal. 2013) (internal
28 quotation marks omitted).

1 Here, the causal connection between the misrepresentation and
2 the loss is obvious. Plaintiffs allege that Defendants concealed
3 ECotality's receipt of a cure notice, receipt of a request for
4 information under threat of penalty, and material dispute with DOE
5 regarding the EV Project. They further allege that the precipitous
6 drop in ECotality's value on August 12 was a result of ECotality's
7 public admission that it would be unable to complete the EV Project
8 and that DOE had suspended all payments to the company. Compl. ¶¶
9 10-11. The very same issues that Defendants allegedly concealed --
10 issues with completion of the EV Project and ECotality's problems
11 with DOE -- allegedly resulted in a significant decline in the
12 value of ECotality's stock. The Court finds that Plaintiffs have
13 sufficiently pleaded loss causation under a risk materialization
14 theory.

15 Regarding the corrective disclosure theory, Defendants argue
16 that "the Company's August 12 Form 8-K made no 'corrective
17 disclosure,' or indeed any disclosure, about the Company's progress
18 under the EV Project, an alleged 'cure notice,' or 'alleged non-
19 compliance' under the EV Project award." Mot. at 21. That is
20 simply incorrect. The Form 8-K states that "the Company notified
21 the DOE that . . . the Company may not be able to fulfill its
22 operational obligations, including under the EV Project" and that
23 DOE "is suspending all payments under the EV Project while it
24 investigates the situation and determines whether the award should
25 continue." RJD I Ex. 11 at 2. The facts pleaded in the complaint
26 allege that the EV Project was the source of "nearly all of"
27 ECotality's revenues. Compl. ¶ 4. Thus the disclosure that
28 ECotality had "been unable to obtain additional financing" combined

1 with the suspension of funding from the EV Project certainly
2 represented a serious threat to ECotality's future. The allegedly
3 false representations in the SPA were necessary to assure the PIPE
4 investors that ECotality was making sufficient progress on the EV
5 Project to satisfy DOE (by affirming that ECotality had not
6 received a cure notice) and that ECotality's relationship with DOE
7 was in good standing (no material dispute or request for
8 information under threat). See id. ¶¶ 5-7. The Form 8-K included
9 disclosures that corrected those allegedly misleading statements.
10 The Court finds that the complaint adequately pleads loss causation
11 under a corrective disclosure theory as well.

12 **B. Section 20(a) Claims**

13 Section 20(a) of the Exchange Act imposes liability on
14 controlling persons for primary violations of federal securities
15 laws. "In order to prove a *prima facie* case under § 20(a),
16 plaintiff must prove: (1) a primary violation of federal securities
17 laws . . . ; and (2) that the defendant exercised actual power or
18 control over the primary violator" Howard v. Everex Sys.,
19 Inc., 228 F.3d 1057, 1065 (9th Cir. 2000). *Scienter* is not an
20 element of this claim, so long as the defendant "is a controlling
21 person of an issuer with *scienter*" Id. "Whether [a
22 defendant] is a controlling person is an intensely factual
23 question, involving scrutiny of the defendant's participation in
24 the day-to-day affairs of the corporation and the defendant's power
25 to control corporate actions." Kaplan v. Rose, 49 F.3d 1363, 1382
26 (9th Cir. 1994) (internal quotation marks omitted). "A director is
27 not automatically liable as a controlling person, although director
28 status is a red light to the court." Id. (internal quotation marks

1 omitted). "At the pleading stage, a plaintiff need only
2 demonstrate that the defendant had the authority to exercise actual
3 power, not the exercise itself." Bruce v. Suntech Power Holdings
4 Co., No. CV 12-04061 RS, 2013 WL 6843610, at *8 (N.D. Cal. Dec. 26,
5 2013).

6 Plaintiffs allege that Ms. Herrmann and Mr. Jones are liable
7 for the Section 10(b) violations because they were control persons.
8 Defendants' primary response is that Plaintiffs fail to plead a
9 primary violation of federal securities law. Because some of
10 Plaintiffs' claims are adequately pleaded, that argument fails.

11 Defendants also argue (very briefly) in two footnotes that
12 Plaintiffs' allegations are insufficient to establish Ms. Herrmann
13 or Mr. Jones as control persons. See Mot. at 23 n.20; Reply at 14
14 n.12. The relevant allegations in the complaint are (1) "Brar,
15 Herrmann and Jones, by reason of their management positions, were
16 controlling persons of the Company;" (2) "Herrmann and Jones each
17 had the power, influence and authority to cause, and did cause,
18 directly or indirectly, others to engage in the wrongful conduct
19 complained of herein, including the content and dissemination of
20 the various statements which Plaintiffs contend are false and
21 misleading;" and (3) "Herrmann and Jones were provided with or had
22 unlimited access to copies of the SPA and the Company's documents
23 and other statements alleged by Plaintiffs to be
24 misleading . . . and had the ability to prevent the issuance of the
25 statements or cause the statements to be corrected." Compl. ¶ 79.
26 Additionally, Plaintiffs allege that the SPA itself acknowledges
27 that the allegedly misleading representations were "made after
28 consultation with ECotality's directors and officers." Opp'n at 23-

1 24; Compl. ¶¶ 31, 80.

2 For the most part, these are "boilerplate" allegations that
3 courts have typically rejected. See In re Downey Sec. Litig., No.
4 CV08-3261-JFW (RZX), 2009 WL 736802, at *15 (C.D. Cal. Mar. 18,
5 2009) ("Plaintiff has failed to make any particularized
6 allegations [T]he [complaint] merely alleges that the
7 [Defendants], by reason of their position . . . had the power to
8 cause . . . the alleged conduct. However, this boilerplate
9 allegation is insufficient to state a claim for control person
10 liability."). The only specific allegation is that the
11 representations in the SPA were made "after consultation with" Ms.
12 Herrmann and Mr. Jones. Perhaps Plaintiffs phrase their allegation
13 that way (and never quote the SPA) because the language of the SPA
14 reveals that the "consultation" does not demonstrate control person
15 liability at all. The SPA states only that the representations
16 relevant to this litigation were true "to the knowledge of the
17 Company, their respective directors, officers, employees, agents or
18 consultants . . ." SPA at 21. Thus, if the Court were to accept
19 Plaintiffs' argument that the "consultation" specified in the SPA
20 establishes control person liability, every employee, agent, or
21 consultant of ECotality would be liable as a control person.

22 Apart from that statement in the SPA, the only allegations
23 Plaintiffs make regarding control liability are Ms. Herrmann's and
24 Mr. Jones' positions in the company, their access to copies of the
25 SPA around the time it was made, and very general allegations that
26 they had the ability to amend or correct the SPA. There are no
27 particularized allegations at all regarding Ms. Herrmann's or Mr.
28 Jones' participation in ECotality's day-to-day affairs or any

1 specifics regarding their ability to control the corporation. The
2 Court finds that the allegations in the complaint are insufficient
3 to state a claim for control liability against either Ms. Herrmann
4 or Mr. Jones. Defendants' motion is GRANTED as to Plaintiffs'
5 control liability claims against Ms. Herrmann and Mr. Jones. Those
6 claims are DISMISSED WITH LEAVE TO AMEND.

7 **C. State Law Claims**

8 Defendants do not make additional arguments against Mr. Brar's
9 liability under Sections 25401 and 25501, California's analog to
10 the Exchange Act. Accordingly, Plaintiffs' state law claims remain
11 undisturbed or are dismissed with leave to amend, depending on the
12 alleged misrepresentation at issue, for the reasons explained above
13 regarding the Exchange Act claims. Plaintiffs' control person
14 liability claims under Section 25504 are DISMISSED WITH LEAVE TO
15 AMEND because Plaintiffs have not pleaded sufficient facts to
16 establish Ms. Herrmann or Mr. Jones were control persons.

17

18 **V. CONCLUSION**

19 Defendants' motion to dismiss is GRANTED in part and DENIED in
20 part. The Court hereby ORDERS as follows:

21 • Plaintiffs' Exchange Act and California Corporations Code
22 claims against Mr. Brar remain undisturbed to the extent they
23 are premised on representations in the SPA that (1) ECotality
24 had never received a cure notice; (2) there were no
25 outstanding material disputes between ECotality and a
26 government agency; and (3) ECotality had never been asked to
27 provide information under threat of legal or administrative
28 sanction.

- Plaintiffs' Exchange Act and California Corporations Code claims against Mr. Brar are DISMISSED WITH LEAVE TO AMEND to the extent they are premised on representations in the SPA that ECotality (1) had not been under investigation or audit by any governmental authority; (2) had not made any disclosure to a governmental authority concerning any alleged non-compliance; and (3) did not need to raise more capital to complete the EV Project.
- Plaintiffs' control person claims under the Exchange Act and California Corporations Code against Ms. Herrmann and Mr. Jones are DISMISSED WITH LEAVE TO AMEND.

12 Plaintiffs may file an amended complaint adding allegations
13 regarding (1) a governmental authority's investigation or audit of
14 ECotality prior to June 18, 2013; (2) ECotality's disclosures to a
15 governmental authority concerning alleged non-compliance before
16 June 18, 2013; (3) ECotality's representation that it needed to
17 raise more capital to complete the EV Project; and (4) Ms. Herrmann
18 and Mr. Jones' control person liability. If Plaintiffs wish to
19 file an amended complaint, they must do so within thirty (30) days
20 of the signature date of this Order. Failure to file an amended
21 complaint before the deadline may result in dismissal with
22 prejudice of those claims that were dismissed with leave to amend.

24 IT IS SO ORDERED.

Dated: March 25, 2015

Samuel J. Conti
UNITED STATES DISTRICT JUDGE